SJR 32 Subcommittee on Medical Liability Insurance

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58th Montana Legislature

February 9, 2004

TO: Members of the SJR 32 Subcommittee on Medical Liability Insurance
Interested Persons
FROM: Dave Bohyer
RE: List of options per Senator Cobb

The list on the following pages was initiated by Senator John Cobb at the January 15, 2004 meeting of the SJR 32 Subcommittee on Medical Liability Insurance and, to this point, compiled by Subcommittee staff at the direction of the Subcommittee from information provided by various stakeholders. The Subcommittee will use the list as a decision tool to focus its interest on the options that the members consider to have the highest priority to address medical liability insurance issues. This initial list is dynamic and is likely to proceed through various iterations in the coming months.

If you have an option that you would like to have added to the list, please forward it to me via e-mail at dbohyer@mt.gov.

NOTICE of UPDATED LIST OF OPTIONS
February 19, 2004

The list on the following pages includes the options initiated by Senator John Cobb at the January 15, 2004 meeting of the SJR 32 Subcommittee on Medical Liability Insurance and the (unduplicated) options identified in *An Overview of Interstate Comparisons of Medical Liability Law, Liability Reforms, and Liability Insurance Options* prepared by Dave Bohyer and presented to the Subcommittee at the November 17, 2003 meeting (Billings). Like the list previously developed and disseminated (25 options), this list (51 options) is dynamic and is likely to proceed through various iterations in the coming months.

Options for Consideration Before the SJR 32 Subcommittee on Medical Liability Insurance

Prepared by Dave Bohyer, Research Director
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(Originally prepared February 9, 2004; Updated February 19, 2004)

Background

The following list was initiated by Senator John Cobb at the January 15, 2004 meeting of the SJR 32 Subcommittee on Medical Liability Insurance and, to this point, compiled by Subcommittee staff at the direction of the Subcommittee from information provided by various stakeholders. The Subcommittee will use the list as a decision tool to focus its interest on the options that the members consider to have the highest priority to address medical liability insurance issues. This initial list is dynamic and it is anticipated that it will proceed through various iterations in the coming months.

Tort Reform

1. Mandatory collateral source
   Discussion: Collateral Source Rule: 27-1-308, MCA. In Montana, the law states that in a case in which the damages exceed $50,000, the total damages must be reduced by the amount of prior payment from collateral sources that do not involve rights of subrogation. The judge -- rather than the jury -- applies the rule and *is required by the statute* to effect the offsets.[1]
   Should the Subcommittee examine this further? ____ Yes ____ No

2. Attorney fees (limit)
   Discussion: For a few of the most adversarial cases, a claimant may feel compelled to retain legal counsel or, ultimately, to file a lawsuit. Reportedly, many or most of these cases are taken by legal counsel on a "contingency fee" basis, in which the attorney is compensated only if the claimant/plaintiff receives an award. The amount of the contingent fee varies, but is typically at least 30% of the award depending on the complexity of the case and the level of the legal system at which the case is ultimately resolved. With respect to medical malpractice claims, Montana has not enacted limits on attorney fees, whereas some other states have.[2]

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[1] *An Overview of Interstate Comparisons of Medical Liability Law, Liability Reforms, and Liability Insurance Options,* by Dave Bohyer, November 2003, Legislative Services Division, Helena, MT, p. 5.

[2] Id., Bohyer, pp. 9-10.

Should the Subcommittee examine this further? ____ Yes ____ No

3. Loss of chance doctrine

Discussion: The "loss of chance" doctrine allows a claimant in a medical malpractice case to show by a majority of evidence that medical negligence has reduced chances of recovery from illness or injury. In most jurisdictions that have recognized the doctrine, the damages are determined using a proportional approach limiting recovery to the percentage of chance lost multiplied by the total damages. Unlike most other states, Montana does not impose proportionality under a 1985 Supreme Court decision.[3]

Should the Subcommittee examine this further? ____ Yes ____ No

4. Offset personal consumption expenses

Discussion: In a "survival action", economic consumption, i.e., the injured party's prospective personal expenses, may not be deducted from the future lost earning calculations. In contrast, if the party's injury had resulted in death and if a "wrongful death action" was awarded, economic consumption would be deductible/deducted from the award.[4]

Should the Subcommittee examine this further? ____ Yes ____ No

5. Advance payments

Discussion: Under recent Supreme Court decisions, an insurer must pay lost wages and medical expenses whenever liability for the loss is reasonably clear, separate and independent of any negotiations and without being able to require a release. With respect to claims for medical malpractice, liability is often very difficult to determine. However, if a medical liability insurer refuses to pay medical expenses and lost wages because the liability for the injury is not clear, the insurer is threatened with a "bad faith" action.[5]

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[3] Paraphrased from Memorandum, from Patrick E. Melby to SJR 32 Subcommittee on Medical Liability Insurance, January 15, 2004, p. 1.

[4] Paraphrased from *Melby*, p. 2.

[5] Paraphrased from *Melby*, p. 3.

Should the Subcommittee examine this further? ____ Yes ____ No

6. Common law third party bad faith

Discussion: Unlike a statutory bad faith claim (where a pattern of business practice must be shown), a common law bad faith claim can be based on only one instance. An insurer may be confronted with a threat of a common law bad faith claim and concomitant punitive damages if the insurer resists paying damages for lost future earnings, offers a settlement that is less than total damages in a loss of chance case, or disputes that an adverse decision by the medical legal panel is *prima facie* evidence that liability for the injury is reasonably clear, thus requiring advance payment of medical expenses and lost wages.[6]

Should the Subcommittee examine this further? ____ Yes ____ No

7. Arbitration

Discussion: Under 27-5-224(2), MCA, an agreement to submit a claim arising out of personal injury arising after the agreement is made is not valid. However, some states allow a health care provider to enter into an agreement to arbitrate a medical malpractice claim prior to the treatment being provided.[7]

Should the Subcommittee examine this further? ____ Yes ____ No

8. Captain of the ship doctrine

Discussion: Under Montana case law, a surgeon (for example), as the "captain of the ship", bears the responsibility for medical mistakes made during a surgical procedure, is *per se* negligent for such mistakes, and does not have the opportunity to defend against the claim by showing that the injury was the result of negligence of another provider, e.g., a hospital's nurse, a radiologist, or anaesthesiologist, over

[6] Paraphrased from *Melby*, p. 3.

[7] Paraphrased from *Melby*, p. 4.

whom the surgeon had no control.[8]

Should the Subcommittee examine this further? ____ Yes ____ No

9. Independent medical exam

Discussion: Under Montana case law, a health care provider who is retained by a third party to perform an independent medical examination has a duty to exercise ordinary care to discover conditions that pose an imminent danger to the examinee's physical or mental well-being and take reasonable steps to communicate any such conditions to the examinee. The provider must also exercise ordinary care to assure that whenever s/he advises an examinee about the examinee's condition following an independent examination, the provider's advice comports with the standard of care for the provider's profession. This decision imposed a duty on the provider -- to discover conditions that pose a danger to a patient and to communicate those conditions to the patient -- that did not exist prior to the Supreme Court decision.[9]

Should the Subcommittee examine this further? ____ Yes ____ No

10. Informed consent

Discussion: The concept of "informed consent" provides that a health care provider has a legal defense to a claim for alleged failure to obtain informed consent if the patient or patient's representative has signed a written document that meets certain guidelines, typically specified by statute. Montana statutes do not provide for informed consent.[10]

Should the Subcommittee examine this further? ____ Yes ____ No

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[8] Paraphrased from *Melby*, p. 5.

[9] Paraphrased from *Melby*, pp. 5-6.

[10] Paraphrased from *Melby*, p. 6.

11. Strengthen Montana Medical Legal Panel

Discussion: Strengthening the MMLP could manifest in a variety of ways, including adding staff, providing additional funding, allowing the results of the Panels' decisions to be used at trial, etc. Whatever objective is identified as the purpose of the "strengthening" would guide the type of strengthening to occur.

Should the Subcommittee examine this further? ____ Yes ____ No

12. Revise "good Samaritan" law

Discussion: "Good Samaritan" laws generally exempt from liability a person who altruistically and in good faith renders emergency assistance or care to another person, e.g., at the scene of an automobile accident, structural fire, flood, etc. In Montana, a "good Samaritan" person is protected from liability for the emergency care or assistance rendered only if the care or assistance occurs at the scene of the emergency or accident.

Should the Subcommittee examine this further? ____ Yes ____ No

13. Ostensible agency

Discussion: The premise of ostensible agency or vicarious liability is that a person who causes, directly or indirectly, a second person to believe that a third person is employed by or is an agent of the first person is liable for damages caused to the second person by the third person even though the third person is not employed, *per se*, by the first person. The underlying premise of ostensible agency is also related to the concept of joint and several liability yet, on the surface, would seem to contradict the tenets of comparative fault. Montana has recognized ostensible agency since early statehood, having enacted the original statute in 1895 and left it unchanged since enactment.[11]

Should the Subcommittee examine this further? ____ Yes ____ No

[11] Id., Bohyer, p. 13.

14. Hedonic loss (limits)

Discussion: In the context of tort damages, "hedonic loss" means the loss of the joys of living and seems to be synonymous with "noneconomic" losses. Hedonic losses may be categorized into four quadrants: (1) practical functioning; (2) emotional/psychological functioning; (3) social functioning; and (4) occupational functioning.

Should the Subcommittee examine this further? ____ Yes ____ No

15. Certificate of merit for expert witnesses

Discussion: Some states require that a person testifying as an expert witness meet certain qualifications in order to be certified as an "expert". Montana does not have a statutory requirement for certification; rather, the Rules of Civil Procedure provide guidelines that a trial judge must use in determining whether or not a witness may testify as an "expert.[12]

Should the Subcommittee examine this further? ____ Yes ____ No

16. (Limit the) discoverability of quality initiatives and peer review

Discussion: Within the medical community, there are some practitioners and facility administrators who perceive that the details of quality improvement initiatives or peer reviews might be used as evidence in a medical liability claim and, therefore, are reluctant to establish or participate in such activities. It is also perceived by some that limiting the "discoverability" of such activities might lead to improvement in medical care through the reduction of avoidable medical errors.

Should the Subcommittee examine this further? ____ Yes ____ No

17. Limit frivolous lawsuits

Discussion: Both the plaintiffs' and defendants' bar claim to rue frivolous lawsuits for medical malpractice. There are two key concepts to consider: (1) the ways in which "limits" might be imposed; and (2) the ways in which an objective observer might distinguish a "frivolous" lawsuit from a legitimate lawsuit.

Should the Subcommittee examine this further? ____ Yes ____ No

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[12] Id., Bohyer, pp. 13, 18.

Options for Consideration Before the SJR 32 Subcommittee
on Medical Liability Insurance

Summary

18. Unless the Legislature does something radical, its options are limited.
Discussion: Tort reform measures adopted in Montana have largely addressed and accommodated the recommendations of medical providers, medical facilities, and insurers. Beyond immunity from liability -- which would require a constitutional amendment -- there may be some other "radical" actions still available and yet to be identified, analyzed, discussed, etc.
Should the Subcommittee examine this further? ____ Yes ____ No

19. Market/national forces
Discussion: The current medical liability insurance "crisis" seems to be a national phenomenon affected by or, partially, resulting from "hard" insurance markets, investment cycles/instruments, ongoing avoidable medical errors, business decisions, dynamic jurisprudence, etc. In Montana, forces beyond the state's boundaries or beyond the state's economic capacity may be affecting medical liability insurance premiums or availability, or both.
Should the Subcommittee examine this further? ____ Yes ____ No

20. What can The Legislature do?
Discussion: The Legislature has two broad options: (1) do nothing, i.e., allow the medical liability insurance market to reach a new equilibrium; or (2) do something, i.e., enact, revise, or repeal a law. Alternatives under the second option fall into two categories: (a) policy changes; or (b) appropriating money; and each of those alternatives can take various forms.
Should the Subcommittee examine this further? ____ Yes ____ No

21. What can stakeholders do *without* legislative changes?
Discussion: Varying stakeholders may be able to independently or jointly pursue various alternatives to mitigate the current medical liability insurance crisis.
Should the Subcommittee examine any of these further?
a) arbitration ____ Yes ____ No
b) pooling risks ____ Yes ____ No
c) quality control ____ Yes ____ No
d) fight (rather than settle) nonmeritorious cases ____ Yes ____ No

Other

22. Medicaid reimbursement (increase)
Discussion: Medicaid is a joint state-federal insurance program for low-income individuals. The reimbursement rates paid to medical providers and facilities in Montana are sufficiently low that some providers decline to take Medicaid patients at all or to limit the number of Medicaid patients in their practices. Increasing Medicaid reimbursements to Montana providers/facilities would provide additional resources from which medical liability premiums could be paid.
Should the Subcommittee examine this further? ____ Yes ____ No

23. Get claims settled faster
Discussion: There may be ways to get claims settled faster than they currently are. The means to faster settlements would likely include either statutory changes (enactments, revisions, repealers) or state appropriations, or both.
Should the Subcommittee examine this further? ____ Yes ____ No

24. Insurance reform
Discussion: Many consumer advocate groups and the plaintiffs bar strongly encourage insurance reform as the best, perhaps only, approach to mitigating the current crisis or precluding future crises. The reforms would likely involve either statutory changes (enactments, revisions, repealers) or state appropriations, or both.
Should the Subcommittee examine this further? ____ Yes ____ No

25. Wisconsin alternative resolution
Discussion: The State of Wisconsin has enacted the Health Care Liability and Injured Patients and Families Compensation Act. Although a many-faceted law, the Act essentially provides a common reinsurance pool for Wisconsin medical practitioners, which acts to limit the costs of medical liability insurance there.
Should the Subcommittee examine this further? ____ Yes ____ No

26. Statute of Limitations: 27-2-205, MCA

Discussion: Montana law requires a plaintiff in a medical malpractice action to commence the action within 3 years after the date of injury or within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may an action be commenced after 5 years from the date of injury. However, this time limitation is tolled for any period during which there has been a failure to disclose any act. Also, for death or injury of a minor who was under the age of 4 on the date of the minor's injury, the period of limitations begins to run when the minor reaches the minor's eighth birthday or dies, whichever occurs first.

Should the Subcommittee examine this further? ____ Yes ____ No

27. Limits on noneconomic damages: 25-9-411, MCA

Discussion: In a malpractice claim or claims against one or more health care providers based on a single incident of malpractice, Montana law limits an award for past and future damages for noneconomic loss to a maximum of $250,000. All claims for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed $250,000. If more than one patient claims malpractice for separate injuries, each plaintiff is limited to $250,000 in noneconomic damages.

Should the Subcommittee examine this further? ____ Yes ____ No

28. Collateral Source Rule: 27-1-308, MCA

Discussion: In Montana, the law states that in a case in which the damages exceed $50,000, the total damages must be reduced by the amount of prior payment from collateral sources that do not involve rights of subrogation.. The judge -- rather than the jury -- applies the rule and is required by the statute to effect the offsets.

29. Joint and Several Liability: 27-1-703, et seq., MCA

Discussion: In Montana, if the negligence of a party to an action is an issue, each

party against whom recovery may be allowed is, with exceptions, jointly and severally liable for the amount that may be awarded to the claimant. However, each party that is negligent has the right of contribution from any other party whose negligence may have contributed as a proximate cause to the injury. An exception to the general rule occurs whenever a party whose negligence is determined to be 50% or less of the combined negligence of all parties determined to be negligent is severally liable only and is responsible only for the maximum percentage of negligence attributable to that party. Another exception is that a party may be jointly liable for all damages caused by the negligence of another party if both acted in concert in contributing to the claimant's damages or if one party acted as an agent of the other.

Should the Subcommittee examine this further? ____ Yes ____ No

30. Periodic Payments: 25-9-412, MCA

Discussion: A party to an action for a medical malpractice claim in which $50,000 or more of future damages is awarded may request the court to enter a judgment ordering future damages to be paid in whole or in part by periodic payments rather than by a lump-sum payment. If such a request is made, the court must enter an order for periodic payment of future damages. The total dollar amount of the ordered periodic payments must equal the total dollar amount of the future damages without a reduction to present value. If the injured party dies prior to full payment of the award, the remainder of the award becomes part of the decedent's estate.

Should the Subcommittee examine this further? ____ Yes ____ No

31. Pretrial Screening: Title 27, chapter 6, MCA

Discussion: Montana has a forum, the Montana Medical Legal Panel[13], and mandatory process established to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of

[13] There is also the Montana Chiropractic Legal Panel that screens claims of chiropractic malpractice. The forum and processes essentially parallel those of the Montana Medical Legal Panel. See Title 26, ch. 12, MCA.

malpractice. In cases where malpractice is reasonably suspected, the Montana Medical Legal Panel makes possible the fair and equitable disposition of claims against health care providers without the complexities, expense, and time-investment of the legal process.

Should the Subcommittee examine this further? ____ Yes ____ No

32. Contributory or Comparative Negligence or Fault: 27-1-702, MCA

Discussion: The concept of contributory or comparative negligence or fault is closely associated with joint and several liability. Contributory negligence does not bar recovery in an action to recover damages for negligence resulting in death or injury if the contributory negligence was not greater than the negligence of the person or the combined negligence of all persons against whom recovery is sought, but any damages allowed must be diminished in the proportion to the percentage of negligence attributable to the person recovering.

Should the Subcommittee examine this further? ____ Yes ____ No

33. Prejudgment interest: 27-1-210, MCA

Discussion: In Montana, it has been a matter of statutory law for nearly 20 years and a judicial practice prior to the 1985 law that interest may be awarded on "on any claim for damages awarded that are capable of being made certain by calculation", i.e., actual damages but not noneconomic damages or court costs or attorney fees.

Should the Subcommittee examine this further? ____ Yes ____ No

34. Specialized "Medical Malpractice" Courts

Discussion: The underlying premise for advocates of medical malpractice courts is that increasing the specialization and expertise among judges would be beneficial to all involved: plaintiffs, defendant-practitioners, and insurers. More judicial expertise in medical issues, it is argued, could enhance the speed and the consistency and coherence of outcomes. Additionally, expert judges might be better able to assess the qualification of "expert" witnesses or the "reasonableness" of awards for both real and noneconomic damages, as well as provide other procedural and substantive benefits. A corollary premise is that an expert judge can better determine the "standard of care" threshold than can a jury,

that the standard of care is more a matter of law (within the judge's purview) than it is a matter of fact (with the jury's purview), and that, as a matter of law, judges' decisions in medical malpractice cases could set precedents for guiding physicians' subsequent conduct.

Should the Subcommittee examine this further? ____ Yes ____ No

35. Jury Education

Discussion: Rather than treat jury members as passive actors waiting to be persuaded by various experts, the court could act to inform juries of the rules of evidence prior to the trial actually beginning. There is also the possibility of providing instructions to the jury before, as well as after, testimony is given. Periodic summaries of evidence, key exhibits, etc., by the attorneys or the judge could also help jurors to separate the wheat from the chaff. The possible downside is that additional time and expense would be a near certainty.

Should the Subcommittee examine this further? ____ Yes ____ No

36. Variability of Jury Awards

Discussion: To the extent that variability of jury awards is inherently undesirable or bad, providing legislative guidance in structuring how damages, particularly noneconomic damages, are assessed is arguably an option.

Should the Subcommittee examine this further? ____ Yes ____ No

37. Alternative Dispute Resolution

Discussion: Alternative Dispute Resolution or ADR is an increasingly common approach to determining facts, assigning responsibility, assessing damages, or a combination. To date, ADR is not used extensively in medical malpractice cases, but is becoming increasingly present in general liability. Ultimately, it can remove disputes from the judicial system and place them in the hands of one or more professional arbitrators, thus eliminating the jury. Some forms of ADR include arbitration, mediation, neutral evaluation and summary jury trials. In the case of arbitration, the decision can be non-binding in that a party can continue to pursue the claim within the legal system if he is not pleased with the result, or, on the other hand, the decision may be the arbitrator's, in which case the option of court appeal is limited. The decision to submit the case to binding or non-binding arbitration is

voluntary and is made before the case has been heard.

Should the Subcommittee examine this further? ____ Yes ____ No

38. Enterprise Liability

Discussion: A common practice in general corporate law, "enterprise liability", is a relationship in which the corporation assumes liability rather than the employee. Under this system as it would apply to medical liability, a hospital, clinic, or other enterprise would assume liability for any alleged malpractice committed by a physician who works in the hospital, clinic, etc.

Should the Subcommittee examine this further? ____ Yes ____ No

39. Selective No-fault Liability

Discussion: The concept of selective no-fault liability proffered for medical liability is not unlike the decades-old "workers' compensation" system. In practical terms, a no-fault system would replace the fault-based tort liability system with a list of adverse outcomes from medical care for which claimants/victims would be compensated for economic loss, regardless of the acts or omissions of a medical practitioner or facility.

Should the Subcommittee examine this further? ____ Yes ____ No

40. Clinical Practice Guidelines

Discussion: One of the more forceful propositions, clinical practice guidelines or CPGs, takes the concept of "standard of care" to a somewhat higher level in which the standard is specifically laid out in a volume of guidelines. If adopted, typically through legislation, CPGs would immunize physicians from suit provided that the applicable CPGs were followed, even where the clinical outcome was adverse to the patient.

Should the Subcommittee examine this further? ____ Yes ____ No

41. State-Run, Stop-Gap Medical Malpractice Liability Coverage

Discussion: The state establishes its own insurance fund from which doctors can purchase insurance if there is no other insurance carrier on the market. Typically overseen in the department of insurance and administered by a third party administrator, these funds try to relieve the immediate crisis and provide immediate

relief to physicians unable to find affordable insurance.

Should the Subcommittee examine this further? ____ Yes ____ No

42. State Patient Compensation Programs

Discussion: Patient compensation funds spread the cost of high awards more broadly. The state creates a fund that pays the portion of a judgment or settlement against a health care provider that exceeds a designated amount— such as $200,000 per occurrence and $600,000 annually. The fund pays the remainder of the award or it may have a maximum – such as up to $1 million. The provider is responsible for awards beyond the funds' maximum unless a corresponding limit on medical liability applies. These funds are funded through an annual surcharge assessed against healthcare providers that participate in the fund, and participation can be mandatory or voluntary. Seven states—Indiana, Louisiana, Nebraska, New Mexico, North Dakota, South Carolina, and Virginia— operate voluntary systems, and three states—Kansas, Pennsylvania, and Wisconsin—operate mandatory programs.

Should the Subcommittee examine this further? ____ Yes ____ No

43. State Subsidies to Providers

Discussion: The state establishes a mechanism that subsidizes all or a portion of the provider's insurance premium. This type of system could be set up as a one-time fund or continue for a limited number of years until insurance premiums stabilize. Subsidies could be made available to all providers, to a select group of providers who practice in high-risk specialties, or to providers in a select medically underserved geographical area within a state.

Should the Subcommittee examine this further? ____ Yes ____ No

44. Joint Underwriting Associations

Discussion: A Joint Underwriting Association (JUA) is a state sponsored association of insurance companies formed with statutory approval from the state for the express purpose of providing certain insurance to the public. JUAs are usually formed because the voluntary market is unwilling to write coverage.

Should the Subcommittee examine this further? ____ Yes ____ No

45. State-Funded Indemnity for Specific Services
Discussion: State-funded indemnity offers liability coverage for providers who typically have a relationship with the state--either through the state university hospital or another type of public hospital system--and who provide critical emergency services. A state indemnity program typically covers a claim against a physician when the physician is working directly for a city, county or state and/or providing specific services such as trauma or obstetrical. The liability is shifted from the provider to the government, and all claims are brought against the state rather than the provider.
Should the Subcommittee examine this further? ____ Yes ____ No

46. Insurance Reform: California's Proposition 103
Discussion: California's Proposition 103 is a 15-year-old initiative composed of six primary elements: mandated an immediate rollback of rates of at least 20%; froze rates for one year; created a stringent disclosure and "prior approval" system of insurance regulation; authorized consumers to challenge insurance companies' rates and practices in court or before the Department of Insurance; repealed anti-competitive laws in order to stimulate competition and establish a free market for insurance; and promoted full democratic accountability to the public in the implementation of the initiative by making the Insurance Commissioner an elected position.
Should the Subcommittee examine this further? ____ Yes ____ No

47. Reform medical board governance
Discussion: Montana could sever any formal links between state licensing boards and state medical societies. Members of medical boards (and separate disciplinary boards, where present) could be appointed by the governor, and the governor's choice of appointees need not be limited to a medical society's nominees.
Should the Subcommittee examine this further? ____ Yes ____ No

48. Require risk prevention
Discussion: Montana could adopt a law, similar to one in Massachusetts, that requires all hospitals and other health care providers to have a meaningful, functioning risk prevention program designed to prevent injury to patients. Massachusetts also requires all adverse incidents occurring in hospitals or in doctors' offices to be reported to the medical board.
Should the Subcommittee examine this further? ____ Yes ____ No

49. Require periodic recertification of doctors based on a written exam and audit of their patients' medical care records
Discussion: Periodic recertification would ensure that practicing physicians (or others) would maintain their knowledge and skills and audits would provide additional information on the quality of their respective practices.
Should the Subcommittee examine this further? ____ Yes ____ No

50. Institute experience rating
Discussion: Doctors could be rated on performance for malpractice premiums. Doctors with numerous malpractice claims wold be reviewed and higher premiums imposed to discouraged less competent providers from practicing and to ensure that competent doctors do not subsidize them.
Should the Subcommittee examine this further? ____ Yes ____ No

51. Spread the risk more broadly
Discussion: The number of classifications of doctor specialties for insurance rating purposes could be reduced. Risk pools for some are small and thus overly influenced by a few losses and the concentration in a few specialties of doctors handling the highest risk patients. Often the high-risk patients are "referred up" from general practitioners who do not bear any of the risk.
Should the Subcommittee examine this further? ____ Yes ____ No

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